

WN-16J

Ms. Joan Delabreau  
Chairwoman, Menominee Tribe of Wisconsin  
P.O. Box 910,  
Keshena, Wisconsin 54135-0910

Dear Chairwoman Delabreau:

I am writing in response to your letter of January 23, 2017, regarding the proposed Aquila Resources Inc. Back Forty Project. In your letter you request that the U.S. Environmental Protection Agency require meaningful consultation between the State of Michigan and the Tribe regarding the proposed project. More specifically, you request that EPA require Michigan to enter into a programmatic agreement with the Menominee Indian Tribe of Wisconsin and EPA in order to resolve federal agency objections regarding the wetland permit required by section 404 of the Clean Water Act, and require a study, under Section 106 of the National Historic Preservation Act (NHPA), of traditional and cultural properties which would be impacted by the project.

In the case of the Back Forty Project, EPA does not have the authority to enter into such an agreement. Section 106 of the NHPA requires federal agencies to take into account the effects of federal undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. As currently proposed, the Back Forty Project requires no federal undertaking because all of the permit decisions for the project are the responsibility of the State of Michigan under federally approved state authorities covering the National Pollutant Discharge Elimination System (NPDES) permit program (Section 402 of the Clean Water Act (CWA), 33 U.S.C. § 1342), the wetlands/dredge and fill permit program (Section 404 of the CWA, 33 U.S.C. § 1344), and Title 1 of the Clean Air Act (42 U.S.C. § 7475). EPA retains an oversight role to review the State's permits and ensure their consistency with these federal statutes. In addition, Michigan maintains state authority to issue mining permits under Part 632 of its Natural Resources and Environmental Protection Act. EPA does not have authority to oversee the State's Part 632 permits. Because the final permit decisions made under all of these authorities are State decisions, they are not subject to NHPA review.

While there is no basis for EPA to consult or to enter into an agreement with the State and Tribe pursuant to Section 106 of the NHPA, EPA would be agreeable to engaging in consultation with the tribe pursuant to its government-to-government consultation policy. This process would be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (<https://www.epa.gov/sites/production/files/2013-08/documents/cons-and-coord-with-indian->

[tribes-policy.pdf](#)).

If you are interested in pursuing consultation, please contact:

Christopher Korleski (W-15J)  
 Director, Water Division  
 U.S. Environmental Protection Agency, Region 5  
 77 West Jackson Boulevard  
 Chicago, Illinois, 60604

I also note that EPA Region 5 has been contacted by a representative for the Tribe to discuss tribal concerns regarding the Clean Water Act Section 404 permit application for this project. The Region is working to schedule a meeting with the Tribe on this topic. Also, in response to your November 28, 2016 letter to Peter Swenson of EPA, Region 5, that raised concerns with the Back Forty Project, the Region has been in contact with tribal staff about scheduling a meeting to better understand those concerns.

In your January 23, 2017 letter, you also request that EPA exercise its federal oversight over the permitting processes for the proposed project. EPA has exercised its discretionary authority to engage with the Michigan Department of Environmental Quality (MDEQ) on each of the three permits required by federal law:

Clean Air Act Permit: During the public comment period, EPA provided MDEQ a comment letter dated October 26, 2016, stating concerns with some of the draft air construction permit conditions. As part of its permitting process, MDEQ provided a response to comments document addressing EPA's comments as well as all comments received during the public comment period at time of final air construction permit issuance. MDEQ revised certain permit conditions to address EPA's concerns.

Clean Water Act Section 402 Permit: EPA provided comments on the draft NPDES permit during the public comment period. In accordance with EPA's Memorandum of Agreement with MDEQ for the NPDES permit program, we received a revised version of the permit and MDEQ's responses to comments from MDEQ on February 1, 2017. EPA is in the process of reviewing the revised draft permit and MDEQ's responses to the comments received during the public comment period that concern the draft NPDES permit.

Clean Water Act Section 404 Permit: In August 2016, EPA objected to MDEQ issuing a Wetlands and Inland Lakes and Streams Permit under its assumed CWA Section 404 program. Aquila Resources Inc. subsequently withdrew its MDEQ permit application. In January 2017, Aquila Resources Inc. re-applied to MDEQ.<sup>1</sup> After finalizing its completeness review, MDEQ will issue a public notice, at which time, the public, tribes, and EPA will have an opportunity to

<sup>1</sup> The permit application can be found in MDEQ's MiWaters database at <https://miwaters.deq.state.mi.us/miwaters/#/external/home> by searching the map application for "55-Aquila Resources."

provide comments. EPA will provide a thorough review of the revised permit application.

EPA will continue to exercise its oversight with respect to the Clean Air Act and Clean Water Act permits, and Region 5 staff would be available to discuss concerns you have with these permits, as discussed above.

Thank you for your interest in this matter. If you have further questions, please contact Peter Swenson, Chief of the Watersheds and Wetlands Branch, EPA Region 5, at 312-886-0236.

Sincerely,

Catherine McCabe  
Acting Administrator